APPENDIX A

[Filed Dec. 22, 1993]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91 CV 2219

JUDGE NATHANIEL R. JONES
JUDGE ANTHONY J. CELEBREZZE
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

vs.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

ORDER

I. THE REMAND ISSUE

The Supreme Court remanded an issue in this case relating to the Court's finding that the maximum total deviation from the ideal district size exceeded 10% and stated:

> On remand, the District Court should consider whether the deviations from the ideal district size are justified using the analysis employed in *Brown, supra,* at 843-846, and *Mahan, supra,* at 325-330.

The Court requests that the parties supplement their briefs on the remand issue and comment on the application of the subsequent decision of the Supreme Court in *Shaw v. Reno*, —— U.S. ——, 113 S. Ct. 2816 (1993).

II. THE PENDING APPLICATION FOR FEES OF THE SPECIAL MASTER

Attorney Lawrence Kane, the special master appointed by the Court, has requested an award of fees and the application has been opposed by the Ohio Attorney General. In his opposition the Ohio Attorney General sets forth the legislation of the Ohio General Assembly that provided the mechanism and the funding for the attorneys to represent the state office holders engaged in the reapportionment process. However, the legislation does not provide any insight to the process or the rationale for the fee arrangement that resulted in the hourly rate of $95 that the Attorney General contends should serve as a model for an award of fees to the special master appointed by the Court. The Attorney General is invited to supplement the opposition to the award of fees as requested by the Special Master with an explanation as to how the $95 hourly rate was determined. Additionally, the Special Master claims that his hourly fees were discounted but does not indicate by what amount. He is invited to supplement his request by providing an affidavit regarding the 1992 private billing rates of the persons who worked on the report.

III. THE PENDING APPLICATION OF THOMAS ATKINS FOR AN AWARD OF FEES

The Court is of the view that a factual account of when Mr. Atkins entered the case on behalf of the plaintiff William Mallory may be relevant to the application of Mr. Atkins for an award of fees. Mr. Atkins is invited to supplement his application by supplying an affidavit with regard to the timing of his entry into the case, the scope of his participation, and an account of the times when he appeared before this Court. The parties may also make any additions to their arguments in light of the Supreme Court's reversal.

IV. BRIEFING SCHEDULE

The Court orders that the supplemental briefs requested in Sections I, II and III be filed with the Clerk by January 14, 1994 with copies of the briefs directed to the chambers of the three judges of this Court by 4:00 p.m. on January 14, 1994.

V. THE HEARING

The Court will conduct a hearing on Tuesday, January 25, 1994 at 1:30 PM in the fourth floor courtroom of the United States Court of Appeals for the Sixth Circuit in Cincinnati at which time it will entertain arguments on the remand issue, the application of Lawrence Kane, the special master, for an award of fees and the application of Mr. Atkins for an award of attorney fees.

IT IS SO ORDERED.

For the Court:

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX B

[Filed Mar. 31, 1994]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91 CV 2219

JUDGE NATHANIEL R. JONES
JUDGE ANTHONY J. CELEBREZZE
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

OPINION AND ORDER

BEFORE: JONES, Circuit Judge; CELEBREZZE, Senior Circuit Judge; and DOWD, District Judge.

NATHANIEL R. JONES, Circuit Judge. The plaintiffs filed this action to challenge the apportionment of Ohio's state legislative districts performed pursuant to 1990 census data. In *Voinovich v. Quilter*, 113 S. Ct. 1149, 1159 (1993), the United States Supreme Court determined that the plaintiffs had established a *prima facie* case that the population disparity among districts violates the Equal Protection Clause of the Fourteenth Amendment. The Court remanded the case to this court, instructing it to determine whether the disparity is justified. After consideration of this issue, we find that the population varia-

tions are justified under established constitutional standards.

I

Pursuant to the Constitution of the State of Ohio, state house districts and state senate districts are drawn by a board of five individuals every ten years.[1] Such a five-member board was established following the 1990 federal census. The majority of the apportionment board[2] appointed Defendant James R. Tilling to draft an apportionment plan on their behalf. After Tilling submitted his plan, the board made various amendments to it, and the plaintiffs in this case challenged the plan that eventually was adopted. On February 18, 1992, in response to the Plaintiffs' constitutional attacks upon the plan, the board made its last changes, resulting in what has been denominated "Amendment D." The plaintiffs maintained their challenge to Amendment D, claiming, *inter alia*, that the populations of some of the districts depart too greatly from the ideal size.

---

[1] Article XI, § 1 of the Constitution of the State of Ohio provides:

> The governor, auditor of state, secretary of state, one person chosen by the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the general assembly.
>
> Such persons, or a majority of their number, shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine house of representatives districts and thirty-three senate districts. Such meeting shall convene on a date designated by the governor between August 1 and October 1 in the year [1971] and every tenth year thereafter. . . .

[2] The majority consisted of George V. Voinovich, Governor of the State of Ohio; Stanley J. Aronoff, President of the Ohio Senate; and Robert A. Taft, II, Secretary of State of Ohio. In the minority were Barney Quilter, Speaker Pro Tempore of the Ohio House of Representatives, and Thomas E. Ferguson, Auditor of the State of Ohio.

A. *The House Districts at Issue*

After the 1990 census, the ideal Ohio house district included 109,567 individuals.[3] Amendment D designates as house districts seven counties whose population fall within ±10% of the ideal house district size. The populations of four of these counties fall between 95% and 105% of the ideal.[4] The populations of the three others fell between 90%-95% or 105%-110% of the ideal: House District 5 (Ashtabula County—population 99,821, or 91.10% of the ideal district size); House District 6 (Fairfield County—population 103,461, or 94.43% of the ideal district size); and House District 7 (Wayne County—population 101,461, or 92.60% of the ideal district size).

Under Amendment D, the largest district (House District 20—a portion of Cuyahoga County) has a population of 114,943, or 104.91% of the ideal district size. As the majority plan stands then, the total deviation[5] be-

---

[3] *See* Ohio Const. art. XI, § 2:

> The apportionment of this state for members of the general assembly shall be made in the following manner: The whole population of the state, as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "ninety-nine" and the quotient shall be the ratio of representation in the house of representatives for ten years next succeeding such apportionment. . . .

According to the 1990 census, Ohio's population was determined to be 10,847,115.

[4] The four counties whose populations fell between 95% and 105% of the ideal district size are: House District 1 (Allen County —population 109,755, or 100.17% of the ideal district size); House District 2 (Warren County—population 113,909, or 103.96% of the ideal district size); House District 3 (Columbiana County—population 108,276, or 98.82% of the ideal district size); and House District 4 (Wood County—population 113,269, or 103.38% of the ideal district size).

[5] As we described *Quilter v. Voinovich*, No. 5:91 CV 2219 (N.D. Ohio Mar. 19, 1992) at n.11:

tween the most populous and least populous state house districts is *13.81%* (or the 104.91% of House District 20 minus the 91.10% of House District 5).

B. *The Senate Districts at Issue*

After the 1990 census, the ideal Ohio senate district included 328,700 individuals.[6] Pursuant to Article XI, Section 11 of the Constitution of the State of Ohio, "[s]enate districts shall be composed of three contiguous house of representatives districts." Under Amendment D, the smallest senate district is Senate District 32—composed of House District 66 (the southwestern quadrant of Trumbull County), House District 67 (the southeastern quadrant of Trumbull County), and House District 68 (Geauga County and the northern half of Trumbull County). Senate District 32 has a population of 308,942, or 93.99% of the ideal district size. The largest is Senate District 1—composed of House District 82 (Williams,

---

Total deviation is arrived at by adding the percentage above the ideal district population of the most overpopulated district to the percentage below the ideal district population of the most underpopulated district. Thus, a districting criterion that allows a *deviation* of puls or minus 5% would, generally speaking, yield a *total deviation* of 10%. *See, e.g., Connor v. Finch*, 431 U.S. 407, 416-17 (1977) (finding that 8.2% above the norm and 8.3% below the norm yields a total deviation, or "maximum deviation," of 16.5%).

(Emphasis in original.)

An alternative means of making the same calculation, used in the text, is to express the districts' relationship to the ideal district in percentage terms and then subtract the lowest percentage value from the highest one.

[6] *See* Ohio Const. art XI, § 2:

. . . The whole population of the state as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "thirty-three" and the quotient shall be the ratio of representation in the senate for ten years next succeeding such apportionment.

Fulton and Defiance Counties), House District 83 (Henry, Pauling, Putnam, and Van Wert Counties), and House District 86 (Hancock and Hardin Counties, and the northeastern quadrant of Auglaize County). Senate District 1 has a population of 343,582 individuals, or 104.53% of the ideal district size. Thus, the total deviation for the senate districts is *10.54.%* (or 104.53% minus 93.99%).

C. *The Court's Remand*

In an unpublished order filed March 19, 1992, we held that the plan's population disparities violated the equal population principles of the United States Constitution. In its opinion, the Supreme Court, *inter alia*, reversed this judgment and held that the plaintiffs had merely stated a *prima facie* case of vote dilution and that the apportionment plan's creators must be given an opportunity to explain whether the deviations are justified. 113 S. Ct. at 1159. Specifically, the Court instructed that we consider whether the deviations from the ideal district size are justified using the analysis employed in *Brown v. Thomson*, 462 U.S. 835, 843-46 (1983), and *Mahan v. Howell*, 410 U.S. 315, 325-330 (1973). 113 S. Ct. at 1159. In the following sections, we fully consider the defendants' justification under *Brown*, *Mahan*, and the Court's other relevant precedents.

II

The Supreme Court's decision in *Reynolds v. Sims*, 377 U.S. 533 (1964), established the principle that the Equal Protection Clause prevents the dilution of votes that can occur when citizens are placed in overpopulated state legislative districts.

> We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state ligislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a

> substantial fashion diluted when compared with votes of citizens living in other parts of the State.

Id. at 568.[7]

We are to give states "[s]omewhat more flexibility" in their establishment of state legislative districts as opposed to federal congressional districts. *Reynolds*, 377 U.S. at 578; *see also Brown*, 462 U.S. at 850 n.2 (O'Connor, J., concurring) ("The Court has recognized that States enjoy a somewhat greater degree of latitude as to population disparities in a state legislative scheme, which is tested under Equal Protection Clause standards, than in a congressional redistricting scheme, for which the Court has held that Art. I, § 2, of the Constitution provides the governing standard."); *Mahan*, 410 U.S. at 321-22, 327. The Court has given instructions as to the nature and extent of this flexibility in *Mahan*, *Brown*, and its other cases in this area.

Whether a *prima facie* case of a Fourteenth Amendment violation is established depends principally upon the amount of total deviation. Deviations from mathematical equality among state legislative districts are to be considered *de minimis* if the total deviation is between 0% and 10%. Where the deviation is *de minimis*, a plaintiff cannot establish a *prima facie* case of discrimination under the Equal Protection Clause. *Brown*, 462 U.S. at 842-43; *Connor v. Finch*, 431 U.S. 407, 418 (1977); *see generally White v. Regester*, 412 U.S. 755, 763-64 (1973) (state needed to provide no explanation for 9.9% total deviation); *Gaffney v. Cummings*, 412 U.S. 735, 750 (1973) (state needed to provide no explanation for

---

[7] At the time *Reynolds* was decided, the Court had already held that Article I, Section 2 of the Constitution requires that congressional districts be subject to an equal population standard. *See Wesberry v. Sanders*, 376 U.S. 1, 6 (1964). *Reynolds* and *Wesberry* both implemented the Court's seminal decision in *Baker v. Carr*, 369 U.S. 186 (1962), which held that districting disputes are justiciable.

7.83% total deviation); *Abate v. Mundt*, 403 U.S. 182, 184-87 (1971) (county explanation required to uphold 11.9% total deviation).

If, as in the instant case, the total deviations exceed 10%, a *prima facie* case of a violation is established and the state is called upon to justify the deviations. Its justification must consist of three components: (1) articulating a "rational state policy" which may justify the deviations; (2) explaining how the apportionment plan "may reasonably be said to advance" the rational state policy; and (3) showing that the deviations resulting from the reasonable pursuit of the rational state policy do not "exceed constitutional limits." *Mahan*, 410 U.S. at 328; *see also Brown*, 462 U.S. at 843.

III

We now consider the components of the justification advanced to explain the population disparity here.

A. *Whether Defendants have asserted a rational state policy.*

The Supreme Court has considered certain purported rational policies to be unacceptable:

> [N]either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow . . . most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large

> that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing.

Reynolds, 377 U.S. at 579-80. On the other hand, thus far the Court's foremost example of a rational state policy is the preservation of political subdivisions within a state. *See, e.g., Brown*, 462 U.S. at 842-43; *Mahan*, 410 U.S. at 329 ("The policy of maintaining the integrity of political subdivision lines in the process of reapportioning a state legislature, the policy consistently advanced by Virginia as a justification for disparities in population among districts that elect members to the House of Delegates, is a rational one."); *Reynolds*, 377 U.S. at 580 ("A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions.").

The defendants seek to justify the total deviations in excess of 10% by asserting the rational state policy of preserving county lines, even with respect to those whole-county house districts whose populations depart by more than 5% from the ideal house district size. As described above, the Court expressly has found such a policy to justify deviations from population equality among state legislative districts.

Furthermore, it also appears that the asserted rational state policy has not been advanced disingenuously. The people of the State of Ohio have enacted constitutional provisions reflecting the proffered policy:

> XI § 3 House of representatives districts
>
> The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, as provided in section 2 of this Article, and in no event shall any house of representatives district contain a population of less than ninety-five per cent nor more

> than one hundred five per cent of the ratio of representation in the house of representatives, except in those instances where reasonable effort is made to avoid dividing a county in accordance with section 9 of this Article.
>
> . . . .
>
> XI § 9 Whole county as district
>
> In those instances where the population of a county is not less than ninety per cent nor more than one hundred ten per cent of the ratio of representation in the house of representatives, reasonable effort shall be made to create a house of representatives district consisting of the whole county.

Ohio Const. art. XI, §§ 3, 9; *see also* Ohio Const. art. XI, § 10(B) ("Each county containing population between ninety and ninety-five per cent of the ratio or between one hundred five and one hundred ten per cent of the ratio may be designated a representative district."). The state constitution also manifests a policy of respecting county lines in the formation of senate districts:

> XI § 11 Formation of senate district
>
> . . . A county having at least one whole senate ratio of representation shall have as many senate districts wholly within the boundaries of the county as it has whole senate ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining senate district. Counties having less than one senate ratio of representation, but at least one house of representatives ratio of representation shall be part of only one senate district.

Ohio Const. art. XI, § 11.

Ohio's clearly stated policy distinguishes this case from *Chapman v. Meier*, in which the Court rejected North Dakota's political boundary explanation for its plan's

deviations. 420 U.S. 1, 25 (1975) ("It is far from apparent that North Dakota policy currently requires or favors strict adherence to political lines.").

We find that the justification the Defendants advance for the total deviations in excess of 10% is appropriate for Equal Protection purposes, and has not been advanced without basis, for there is a state constitutional policy favoring the preservation of county lines when establishing state legislative districts.

B. *Whether the plan reasonably advances the policy.*

The next question is whether Amendment D may reasonably be said to advance this rational state policy. The house districts were formed by following the procedures outlined in the state constitution:

> XI § 10 Creation and numbering of house of representatives districts
>
> The standards prescribed in sections 3, 7, 8, and 9 of this Article shall govern the establishment of house of representatives districts, which shall be created and numbered in the following order to the extent that such order is consistent with the foregoing standards:
>
> (A) Each county containing population substantially equal to one ratio of representation in the house of representatives, as provided in section 2 of this Article, but in no event less than ninety-five per cent of the ratio nor more than one hundred five per cent of the ratio *shall* be designated a representative district.
>
> (B) Each county containing population between ninety and ninety-five per cent of the ratio or between one hundred five and one hundred ten per cent of the ratio *may* be designated a representative district.

Ohio Const. art. XI, § 10 (emphasis added).

Subsection 10(A) thus mandates the creation of whole county house districts where the counties fall within ±5% of the ideal size; such counties could not in themselves create a total deviation above 10%. Subsection 10(B) permits the apportionment board to create districts out of counties within an additional 5% of the ideal size. We believe that providing this amount of additional latitude for house districts, but no more, is a reasonable manner in which the state may advance its policy.

The Ohio Constitution contains no equivalent provision that permits the creation of senate districts that deviate by more than 5% from the ideal. However, in the state court companion to this lawsuit, the Ohio Supreme Court directly upheld the creation of Senate District 32, the only district outside the permissible range. *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992). This decision interprets the constitution to permit the apportionment board to place the constitutional prohibition against dividing counties above the requirement that district populations fall within 5% of the ideal. The Ohio court explained that:

> leaving Senate District 32 underpopulated was unavoidable because irreconcilable conflicts with [the constitutional sections prohibiting the division of counties between senate districts] prevented adding population from adjacent territory. . . . When such provisions are irreconcilable, those public officials designated to apportion the state by Section 1 of Article XI have the duty to choose the proper course, and this court will not order them to correct one constitutional violation by committing another.

Id. at 1022. Since Ohio's highest court has found the district's population deviation authorized by the state constitution, we accept that determination. *Brown v. Ohio*, 432 U.S. 161, 167 (1977). At least where a district so created deviates by no more than 10% from the ideal, this interpretation of the Ohio Constitution reveals a man-

ner of advancing the state policy that is just as reasonable as the expanded population range that Article XI, Section 10 explicitly provides for whole-county house districts.

Despite our conclusion that Ohio's constitution reasonably advances the policy, we must further delve into the implementation of the discretion that the constitution gives the apportionment board. Plaintiffs argue that this *particular* plan inconsistently or arbitrarily advances the policy, and we must not casually dismiss this assertion. *See Roman v. Sincock*, 377 U.S. 695, 710 (1964) (rational factors applied in a manner "free from any taint of arbitrariness or discrimination"); *Brown*, 462 U.S. at 847; *Mahan*, 410 U.S. at 325. One way that plaintiffs may show arbitrariness is to prove that a plan could be produced that advances the policy just as well, but which creates a smaller total deviation. This is why the Court rejected Mississippi's county-line justification in *Connor v. Finch*, 431 U.S. at 420 ("[T]he plaintiffs in this case submitted to the District Court an alternative Senate plan that served the state policy against fragmenting county boundaries better than did the plan the court ultimately adopted and also came closer to achieving districts that are as nearly of equal population as is practicable.") (quotation omitted). In cases that reject districting plans, the Court has typically made reference to an alternative plan to show that the contested plan did not achieve the state's stated policy. *See Swann v. Adams*, 385 U.S. 440, 445 (1967) ("Florida could have come much closer to providing districts of equal population that it did" and still advanced its policy); *Kilgarlin v. Hill*, 386 U.S. 120, 124 (1967) (per curiam) ("[t]he District Court [did not] articulate any satisfactory grounds for rejecting at least two other plans presented to the court, which respected county lines but which produced substantially smaller deviations from the principles of *Reynolds v. Sims*."); *cf. Mahan*, 410 U.S. at 326 (plan approved in part because "[t]here was uncontradicted evidence offered in the

District Court to the effect that the legislature's plan, subject to minor qualifications, produces the minimum deviation above and below the norm, keeping intact political boundaries. . . .").

Consistent with this case law, Plaintiffs focus their objections to the instant plan on the argument that it arbitrarily advances the defendants' stated policies. Having reviewed their specific objections, however, we find that they are inapposite. Plaintiffs' assertions of arbitrariness at best support the conclusion that Amendment D could have better effectuated certain districting goals, such as keeping townships in the same district, but these objections alone do not cast doubt on the state's advancement of its policy with respect to the whole-county districts that created the total deviation of greater than 10% here. Because the state policy at issue here is concerned narrowly with keeping together whole counties, and because the board has in fact preserved all whole counties within the applicable population limits, it cannot be said that the policy has been advanced arbitrarily.

The three state house districts that depart more than five percent from the ideal are whole counties. The state senate district that deviates more than five percent is, likewise, composed of two counties—no more, no less. Except for these whole-county districts, the plan's total deviation falls below the 10% threshold that is necessary for the plaintiffs to prove a *prima facie* case of population disparity. Thus, we find the deviations at issue here are the result of line-drawing that reasonably advances the rational state constitutional policy.

C. *Whether the total deviation exceeds constitutional limits.*

The final consideration to be addressed is whether the total deviations of 13.81% and 10.54% are constitutionally excessive. As the United States Supreme Court in *Brown* stated:

> Even a neutral and consistently applied criterion such as use of counties as representative districts can frustrate *Reynolds*' mandate of fair and effective representation if the population disparities are excessively high. "A State's policy urged in justification of disparity in district population, however rational, cannot constitutionally be permitted to emasculate the goal of substantial equality." *Mahan*[, 410 U.S. at 326].

Brown, 462 U.S. at 845; *cf. Reynolds*, 377 U.S. at 581 ("Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-protection principle in that legislative body."). In light of *Mahan*, the total deviations at issue in the instant case are not constitutionally excessive.

In *Mahan*, the Virginia legislature adopted an apportionment plan for state legislative districts that resulted in a total deviation of 16.4% with respect to the state house districts. As in the instant case, the justification offered for the deviation was the preservation of political subdivisions. The Supreme Court concluded:

> Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause of the Fourteenth Amendment the mathematical formula that establishes what range of percentage deviations is permissible, and what is not. The 16-odd percent maximum deviation that the District Court found to exist in the legislative plan for the reapportionment of the House is substantially less than the percentage deviations that have been found invalid in the previous decisions of this Court. *While this percentage may well approach tolerable limits, we do not believe it exceeds them.* Virginia has not sacrificed substantial equality to justifiable deviations.

Mahan, 410 U.S. at 329 (emphasis added).

Other state-districting cases in which the Court has found a violation concerned higher total deviations than *Mahan*. *See Reynolds*, 377 U.S. at 549 (500+% deviation) (approximate calculation from figures given); *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 701-02 (1989) (78% deviation) (city districts); *Kilgarin*, 386 U.S. at 122 (26.48% deviation) (dicta); *Swann*, 385 U.S. at 442-43 (25.65% deviation); *Chapman*, 420 U.S. at 22 (20.14% deviation) (court-ordered plan); *Connor*, 431 U.S. 407 at 416-17 (19.3% house and 16.5% senate deviations). Likewise, deviations below the *Mahan* threshold have been found permissible. *See Abate*, 403 U.S. at 184 (11.9% deviation) (city boundaries); *Jenkins v. City of Pensacola*, 638 F.2d 1249, 1255 (5th Cir.) (14% deviation) (city districts), *cert. dismissed*, 453 U.S. 946 (1981).

We can find no case holding that a total deviation—with respect to a legislative plan of apportionment of *state* legislative districts—of less than 16.4% is constitutionally excessive.[8] Thus, we hold that the total deviations of 13.81% and 10.54% are not excessive for purposes of the Equal Protection Clause of the Fourteenth Amendment. Under Ohio's constitutional scheme, it is possible that the preservation of whole-county districts could one day beget total deviations higher than those in Amend-

[8] We note that in *Brown*, the Court upheld a total deviation that was much higher than even that in *Mahan*, approving Wyoming's placement of a state representative in a sparsely populated county that created a total deviation of 89%. The Court carefully narrowed its holding to the particular fact situation, showing that the single representative did not greatly dilute the voting power of others in the state, since the *average* deviation between districts was 16%. 462 U.S. at 846-47. We also note that the Court has placed stricter limits on congressional reapportionment. In *Karcher v. Daggett*, 462 U.S. 725, 731-32 (1983), the Court struck down New Jersey's *congressional* reapportionment plan even though the deviation was a minuscule 0.6984%. In that case, the Court found the state's asserted justification was so empty that it did not even justify the small deviation at issue.

ment D—and in fact as high as 20%, if a county exists that is 10% below the ideal population and another county exists that is 10% above. We express no view today on whether such higher total deviations would be excessive, for we need only decide that those in this plan are not.

IV

In sum, we hold today that the Ohio reapportionment plan survives scrutiny under the one-person-one-vote guarantee of the Equal Protection Clause because (1) the defendants have advanced a genuine, rational state policy to justify the deviations from population equality among the state legislative districts; (2) their plan reasonably furthers the rational state policy; and (3) the 13.81% and 10.54% total deviations fall within constitutional limits. Accordingly, we enter judgment for the defendants on this issue.

IT IS SO ORDERED.

/s/ Nathaniel R. Jones
NATHANIEL R. JONES
U.S. Circuit Judge

/s/ Anthony J. Celebrezze
ANTHONY J. CELEBREZZE
Senior U.S. Circuit Judge

/s/ David D. Dowd
DAVID D. DOWD
U.S. District Judge

APPENDIX C

[Filed Mar. 31, 1994]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91 CV 2219

JUDGE NATHANIEL R. JONES
JUDGE ANTHONY J. CELEBREZZE
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

OPINION AND ORDER

BEFORE: JONES, Circuit Judge; CELEBREZZE, Senior Circuit Judge; and DOWD, District Judge.

NATHANIEL R. JONES, Circuit Judge. Before this court is the Motion of Plaintiffs for Leave to File a Second Amended Complaint. For the following reasons, the motion is granted.

I

This case is on remand from the United States Supreme Court, which, in *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993), resolved three issues concerning the defendants'

plan that reapportioned Ohio's state legislative districts pursuant to 1990 census data. First, the Court held that the plan does not violate the protection against race-based vote dilution in § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. *Id.* at 1154-58. Second, the Court held that the plan does not violate the Fifteenth Amendment to the Constitution. *Id.* at 1158. Third, the Court found that the plaintiffs had stated a *prima facie* case of population-based vote dilution in violation of the Equal Protection Clause of the Fourteenth Amendment, and instructed this court to further consider that issue. *Id.* at 1159. The court then remanded the case "for further proceedings in conformity with this opinion." *Id.* at 1159-60. We resolve the third issue in a separate opinion filed today.

Several months after its *Voinovich* decision, the Court decided the important districting case *Shaw v. Reno*, 113 S. Ct. 2816 (1993). *Shaw* held for the first time that a plaintiff can state a claim under the Equal Protection Clause by alleging that a districting plan reflects "an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification." *Id.* at 2832. As the Court stated:

> Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.

113 S. Ct. at 2832. In their initial submissions to this court on remand, the parties discussed *Shaw*'s applicability to this case, and in a December 22, 1993 Order we requested that the parties comment further on the applicability of *Shaw*. At this juncture, the plaintiffs submitted the instant motion to amend their complaint to plead the

Shaw issue, and they have filed a complaint that is amended accordingly. The defendants oppose this motion.

II

The plaintiffs' first amended complaint alleged that the apportionment plan violated the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the Constitution. 113 S. Ct. at 1153. As the Court described the allegations:

> According to the appellees, the plan "packed" black voters by creating districts in which they would constitute a disproportionately large majority. This, appellees contended, minimized the total number of districts in which black voters could select their candidate of choice. In appellees' view, the plan should have created a larger number of "influence" districts —districts in which black voters would not constitute a majority but in which they could, with the help of a predictable number of cross-over votes from white voters, elect their candidates of choice.

Id. In the earlier proceedings before this panel, both parties produced volumes of information dealing with the boundaries, populations, and racial composition of Ohio's legislative districts. The parties explicitly raised the issue of racial gerrymandering, albeit in the context of alleging violations of the Fifteenth Amendment and the Voting Rights Act rather than of the Fourteenth Amendment. The issues tried thus included those implicated in *Shaw*. As the plaintiffs' claims are so closely related to the racial gerrymandering concerns in *Shaw*, we feel confident that had *Shaw* been decided before this case was initiated, the plaintiffs would have alleged a violation of the cause of action that that case establishes. Defendants argue that the Court's remand order and Federal Rule of Civil Procedure 15(b) prohibit us from allowing the plaintiffs to amend their complaint, but in fact both permit us to do so.

A. *The Scope of the Remand.* It is established law that "[w]hile a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (quotation omitted) (citing *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939)). This is known as the "mandate rule." *See Jones v. Lewis*, 957 F.2d 260, 262 (6th Cir.) (under the "mandate rule," a district court on remand "may consider those issues not decided expressly or impliedly by the appellate court or a previous trial court."), *cert. denied*, 113 S. Ct. 125 (1992).[1]

Under the mandate rule, we may not reconsider the issues decided by the Supreme Court, which are laid out above. This is the relevant point made by the cases, cited by the defendants, which hold that "an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennsylvania R.R. Co.*, 334 U.S. 304, 306 (1948). However, the case law nevertheless allows us to consider issues which have not been decided. In this case, the Court expressly abstained from passing upon the type of Equal Protection Clause issue discussed in *Shaw*, because plaintiffs did not plead it nor did this court reach it in its earlier decision:

> Appellees' complaint does not allege that the State's conscious use of race in redistricting violates the Equal Protection Clause; the District Court below did not address the issue; and neither party raises it

---

[1] *See also Pan-Pacific Union*, 987 F.2d 594, 596 (9th Cir. 1993) ("The district court may not reconsider matters decided by us on the first appeal, but it may address any issue that we did not dispose of either expressly or impliedly."); *Hester v. International Union of Operating Engineers*, 941 F.2d 1574, 1581 n.9 (11th Cir. 1991) (quotation omitted) ("Notwithstanding the law of the case doctrine, a district court on remand is free to address, as a matter of first impression, those issues not disposed of on appeal."); *Rutherford v. United States*, 806 F.2d 1455, 1459-60 (10th Cir. 1986); *Panama Processes v. Cities Service Co.*, 789 F.2d 991, 994 (2d Cir. 1986).

> here. Accordingly, we express no view on how such a claim might be evaluated.

113 S. Ct. at 1157. Thus, the Court's mandate does not prohibit us from considering that issue on remand.

The defendants stress that at one point in its opinion, the Court stated that it was remanding "only" for further proceedings on the population deviation issue. *Id.* at 1154. This statement, which comes at the end of the opinion's introductory section in which the Court summarizes the facts of the case, appears to indicate simply that the Court is remanding only the population claim and not the Voting Rights Act or Fifteenth Amendment ones. Though it is presumably within the Court's power to order us not to consider any other issues, this one-time use of the word "only" does not demonstrate that it meant to do so.

Because certiorari in *Shaw* had been granted before the Court's decision in this case, and because the oral argument in this case touched on the *Shaw* issue, the defendants also argue that it is meaningful that the Court could have discussed the *Shaw* issue but chose not to. However, these circumstances are irrelevant. The fact is that the Court did not expressly or impliedly resolve the issue that the plaintiffs' wish to allege, so we are not foreclosed from considering it.

B. *Federal Rule of Civil Procedure 15(b).* Rule 15 (b) allows an amendment of pleadings that is necessary to cause them to conform to the issues that have been tried. Moreover, the Rule instructs that a court "shall [allow an amendment] freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits." [2] The de-

---

[2] Rule 15(b) provides:

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of

fendants argue that it would be an abuse of discretion for this court to allow an amendment at this stage of the proceedings. They claim that it is well-established under *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1258-59 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2889 (1991), that it is an abuse of discretion for a court to amend a complaint late in the proceedings. However, *Prather* prohibited the amending of a complaint only because doing so in that case would be highly prejudicial to the defendant. Here, we do not think the defendants would be prejudiced by the amending. The following considerations assure us that justice demands that we allow the complaint to be amended.

First, the *Shaw* claim is closely linked to the earlier proceedings, such that the relevant facts have already been developed and the issues were in part explored in the earlier hearing.[3] The future litigation burden is correspondingly reduced, and this case involves competent attorneys on both sides who can easily make the adjustment to representing their clients with respect to the *Shaw* issue. Second, the contours of the cause of action established in *Shaw* were unclear until the issuance of the opin-

---

the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not reflect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

[3] In fact, the defendants' claim that the Supreme Court oral argument touched on the *Shaw* issue shows how closely linked the issues are.

ion in that case, so it is unfair for us to have expected the plaintiffs to have specifically articulated the issue earlier. Due to the closeness of the issues, we feel that the fact that *Shaw* had not yet been decided is the only reasonable explanation for why the plaintiffs did not make the specific claim previously. As just one example, the Plaintiffs' Proposed Findings of Fact, submitted prior to our earlier decision, contains a fourteen-page argument under the heading "1991 Plan Violates Ohio Constitution as a Result of Race Conscious Gerrymandering." R. —— at 114-28. We must assume that the plaintiffs would have alleged racial gerrymandering in violation of the Fourteenth Amendment as well, had such a cause of action been recognized.

If the plaintiffs have a meritorious constitutional claim here under *Shaw*, it would be unfair in the extreme for that challenge to go unheard simply because *Shaw* was decided after the complaint was filed. We therefore GRANT the plaintiffs' motion for leave to file a second amended complaint.

IT IS SO ORDERED.

/s/ Nathaniel R. Jones
NATHANIEL R. JONES
U.S. Circuit Judge

/s/ Anthony J. Celebrezze
ANTHONY J. CELEBREZZE
Senior U.S. Circuit Judge

Dowd, Dissenting,

In my view, the recent decision of *Shaw v. Reno*, 113 S. Ct. 2816 (1993) dealing with Congressional redistricting for the State of North Carolina is anchored in a factual situation strikingly dissimilar to the reapportionment of Ohio for its General Assembly. As a consequence, I would deny the motion of the plaintiffs to file a second amended complaint. Accordingly, I respectfully dissent.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISON

Case No. 5:91 CV 2219

JUDGE NATHANIEL R. JONES
JUDGE ANTHONY J. CELEBREZZE
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER
Riffe Office Tower
77 South High Street
Columbus, Ohio 43215

and

THOMAS E. FERGUSON
88 East Broad Street
Columbus, Ohio 43215

and

GLEN ACHTERMANN
802 Kaler Avenue
Bucyrus, Ohio 44820

and

SAM BARONE
200 East Vine Street
Mount Vernon, Ohio 43050

and

SANDRA GUY
876 Jason Avenue
Akron, Ohio 44314

and

ROBERT MCLAUGHLIN
1356 Riverside Drive
Akron, Ohio 44310

and

JAMES B. MCCARTHY
2416 Grant Avenue
Cuyahoga Falls, Ohio 44223

and

GLADYS HENSON
317 Nye Street
Marion, Ohio 43302

and

TOM KILBANE
2736 U.S. Route 224 East
Greenwich, Ohio 44837

and

ROBERT H. TRAINER
129 Columbia Drive
Waverly, Ohio 45690

and

A. WAYNE BUSSLER
727 Herms Hill
Wheelersburg, Ohio 45694

and

JAMES P. SPEROS
7356 Williams Road
Concord, Ohio 44077

and

KENNETH THORNE
8814 Norwood Drive
Mentor, Ohio 44060

and

CHARLES WALKER
866 South Hoskins
Akron, Ohio 44320

and

WILLIAM SHANKLIN
512 Otterbein
Dayton, Ohio 45406

and

CLARENCE LUMPKIN
1330 East 20th Street
Columbus, Ohio 43211

and

TYRONE RILEY
316 North Michigan Street
Toledo, Ohio 43624

and

WILLIAM L. MALLORY
907 Dayton Street
Cincinnati, Ohio 45214,

Plaintiffs,

vs.

GEORGE V. VOINOVICH
Riffe Office Tower
77 South High Street
30th Floor
Columbus, Ohio 43266-0601

and

STANLEY J. ARONOFF
The Ohio Senate
Statehouse
Columbus, Ohio 43266-0604

and

ROBERT A. TAFT, II
30 E. Broad Street
14th Floor
Columbus, Ohio 43266-0418

and

JAMES R. TILLING
The Ohio Senate
Statehouse
Columbus, Ohio 43266-0604,
Defendants.

SECOND AMENDED COMPLAINT

Plaintiffs' Second Amended Complaint amends Plaintiffs' First Amended Complaint in only two respects. First, Count IV, entitled "Violation of the Equal Protection Clause—Segregation of Voters by Race Without Compelling Governmental Justification", is added. Second, the Prayer for Relief has been revised. Plaintiffs seek leave to file a Second Amended Complaint pursuant to a Motion of Plaintiffs for Leave to File a Second Amended Complaint, filed with the Court on January 14, 1994.

Plaintiffs themselves and for and on behalf of all persons similarly situated complain of Defendants, George V. Voinovich, Stanley J. Aronoff, Robert A. Taft, II, and James R. Tilling, official acts and allege as follows:

* * * *

VII. COUNT FOUR: VIOLATION OF THE EQUAL PROTECTION CLAUSE—SEGREGATION OF VOTERS BY RACE WTHOUT COMPELLING GOVERNMENTAL JUSTIFICATION

52. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the separation of voters by states solely on the basis of race where such separation cannot be justified by a compelling governmental interest. The reapportionment plan adopted by the Defendants on February 18, 1992 intentionally separated Ohio voters on the basis of race without regard for the traditional redistricting principles set forth in the Ohio Constitution and otherwise without any compelling governmental justification. To justify the creation of race-based districts in the urban centers of Ohio, Defendants asserted that there was widespread racial bloc voting throughout Ohio. The trial court specifically found, and the Supreme Court of the United States confirmed, that Ohio did not suffer from legally cognizable racially-polarized voting. *Voinovich v. Quilter,* —— U.S. ——, 113 S. Ct. 1149, 1159 (1993).

53. The Defendants deliberately created race-based legislative districts in urban centers initially and then using the purported, but sham, necessity of creating such districts as the basis for ignoring the traditional anti-gerrymandering provisions of the Ohio Constitution throughout the state of Ohio. Absent the ripple effect of the racial gerrymandering in the urban centers of the state of Ohio, the Defendants would not have been forced to ignore on a wholesale basis the directives of Article XI, Section 7, of the Ohio Constitution to follow existing political and legislative boundaries wherever possible.

54. Instead of advancing "a rational state policy of preserving county boundaries", *Voinovich v. Quilter,* 113 S. Ct. at 1159, the Defendants have selectivly chosen specific areas where they will honor county and other political boundaries, and other areas where they will abandon the

county, political, and legislative boundaries. The decision to abandon the traditional districting mandates contained within the Ohio Constitution is neither compelled by the doctrine of federal supremacy, nor based on any lawful, organized, or rational districting criteria. Defendants are without power to abandon the Ohio Constitution in the redistricting of the state.

55. The Defendants have articulated no compelling governmental interest for the wholesale abandonment of the provisions of the Ohio Constitution. As a result, the Defendants have drawn irregular districts in numerous places throughout the state, districts which have no explanation other than the ripple effects caused by the racially drawn districts in the urban centers. In some instances, the racially drawn districts themselves have irregular shapes not required by the Ohio Constitution.

56. The districts which have been modified solely on the basis of race include House Districts 31, 30, 22, 21, 38, 39, 44 and 49. No evidence has been presented to the trial court that either legally cognizable remedial action was necessary to draw these racially gerrymandered districts, or that the creation of such districts was narrowly tailored to further any compelling governmental need. In *Voinovich*, the Supreme Court eliminated compliance with the federal Voting Rights Act as a justification. In *Shaw v. Reno*, —— U.S. ——, 113 S. Ct. 2816 (1993), the Supreme Court underscored the necessity for state officials to follow objective, rational policies such as those contained in the Ohio Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court:

(a) Enter judgment for Plaintiffs declaring and finding that (i) the plan adopted by the Board majority violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution in that it segregates

voters by race without any compelling governmental justification and violates the Ohio Constitution; (ii) the plan adopted by the Board majority violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution in that it violates the one-person, one-vote rulings of the United States Supreme Court; (iii) the federal Voting Rights Act, 42 U.S.C. § 1973, does not require the establishment of segregated voting districts in the absence of an evaluation and conclusion that 1981 districts drawn pursuant to the Ohio Constitution conflict with the requirements of the Act; (iv) the Defendants have improperly used the Voting Rights Act as an excuse to ignore Ohio Constitutional requirements to adopt a racially gerrymandered and partisan apportionment plan which intentionally packed, fragmented and segregated minority voters; and (v) under the doctrine of pendent jurisdiction, to declare that the adopted 1992 apportionment plan is invalid under Article XI of the Ohio Constitution;

(b) Determine that Plaintiffs designated as class representatives are appropriate class representatives for the allegations of the class set forth herein and certify such class as plaintiffs herein;

(c) Grant a permanent injunction that directs the Ohio Apportionment Board to reconfigure its 1992 Plan;

(d) Grant Plaintiffs their costs of the litigation, necessary expenses of the litigation, and reasonable attorneys' fees pursuant to 42 U.S.C. §§ 1988 and 19731(e); and

(e) Award to Plaintiffs such other, further and necessary relief as the Court deems appropriate.

Respectfully submitted,

/s/ Armistead W. Gilliam, Jr.
ARMISTEAD W. GILLIAM, JR.
Trial Counsel (0022082)
ANN WIGHTMAN (0010492)
FARUKI GILLIAM & IRELAND
600 Courthouse Plaza, S.W.
10 North Ludlow Street
Dayton, Ohio 45402-1818
(513) 227-3728

/s/ Thomas I. Atkins
THOMAS I. ATKINS
135 Eastern Parkway
No. 11B1
Brooklyn, New York 11238
(718) 638-4153

Attorneys for Plaintiffs

APPENDIX E

IN THE SUPREME COURT OF OHIO

Case No. 91-1882

ORIGINAL ACTION

GEORGE V. VOINOVICH, *et al.*,
Plaintiffs,

VS.

THOMAS E. FERGUSON, *et al.*,
Defendants.

DEFENDANTS FERGUSON AND
QUILTER'S PREHEARING BRIEF

---

* * * *

B. *Fourteenth Amendment*

The Plaintiffs' unlawful, racially conscious activity described above in drawing and adopting the 1991 apportionment plan violates the Equal Protection Clause of the Fourteenth Amendment.

The Fourteenth Amendment to the United States Constitution has been used by the United States Supreme Court to strike down racially discriminatory restrictions on the right to vote. *See*, e.g. *Nixon v. Herndon*, 273 U.S. 536, 540-41, 47 S. Ct. 446, 446-47 (1927) in which the Supreme Court stated that the Fourteenth Amendment protects the right of citizens, regardless of race or color, to vote. *Accord*: *Neal v. Delaware*, 103 U.S. 370 (1881) where the Supreme Court of the United States held that

the legal effect of the adoption of the Fourteenth Amendment, and the laws passed for its enforcement, was to annul so much of existing state law as was inconsistent therewith, including provisions confining suffrage to whites. The deliberate dilution of voting strength of protected minorities by a law making body such as the Plaintiffs here in adopting a plan for redistricting is sufficient to violate the Equal Protection Clause of the Fourteenth Amendment. *See, Moore v. Brown*, 448 U.S. 1335, 101 S. Ct. 16, 17 (1980); *Lodge v. Buxton*, 639 F.2d 1358, 1362-63, 1375 (5th Cir. 1981), *aff'd sub num. Rogers v. Lodge*, 488 U.S. 613, 102 S. Ct. 3272 (1982); *Velasquez v. City of Abilene*, 725 F.2d 1017, 1021 (5th Cir. 1984); *Stewart v. Waller*, 404 F. Supp. 206, 215 (N.D. Miss. 1975) (per curiam); *Chapman v. Nicholson*, 579 F. Supp. 1504, 1507-08 (N.D. Ala. 1984).

Plaintiffs need not prove that the challenged action was motivated solely by the purpose to discriminate by diluting the voting strength of minorities. *Rybicki v. State Board of Elections*, 574 F. Supp. 1082, 1105-06 (N.D. Ill. 1982)

The standards for determining a Fourteenth Amendment violation are the same as those for determining a Fifteenth Amendment violation. *Butts v. City of New York*, 779 F.2d 141, 143 n.1 (2d. Cir. 1985) *cert. denied*, 478 U.S. 1021, 106 S. Ct. 3335 (1986) (citing *Mobile v. Bolden*, 446 U.S. 55, 62, 100 S. Ct. 1490, 1497 (1980)). Thus, for the same reasons stated below with respect to the Fifteenth Amendment, Plaintiffs' activities violate the Fourteenth Amendment to the United States Constitution.

* * * *

Respectfully submitted,

/s/ Armistead W. Gilliam, Jr.
by Deborah A. Millum
ARMISTEAD W. GILLIAM, JR.
(0022082) Trial Attorney
ANN WIGHTMAN (0010492)
LAURA A. SANOM (0039451)
FARUKI GILLIAM & IRELAND
600 Courthouse Plaza, S.W.
10 North Ludlow Street
Dayton, Ohio 45402
(513) 227-3728

Attorneys for Defendants
Thomas E. Ferguson and
Barney Quilter

* * * *

APPENDIX F

STATUTORY PROVISIONS

28 U.S.C. § 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 2284. Three-judge court; when required; composition; procedure

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

> (1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least

one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the atcion shall be given by registered or certified mail to the Governor and attorney general of the State.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

APPENDIX G

No. ———

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

———

In re: GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Petitioners.

———

AFFIDAVIT

STATE OF OHIO:

ss:

COUNTY OF FRANKLIN:

Now comes John F. Bender, being first duly cautioned and sworn, says:

1. I am the Chief Elections Counsel to the Ohio Secretary of State, Robert A. Taft, II, who is a Petitioner in the above-captioned matter.

2. As Chief Elections Counsel to the Ohio Secretary of State, I am responsible for compliance with and enforcement of Ohio elections laws.

3. Partisan candidates for seats in the 121st Ohio General Assembly were required to file nominating petitions with the appropriate county boards of elections on or before February 17, 1994.

4. Two hundred ninety-two (292) individuals filed nominating petitions as partisan candidates for seats in the 121st Ohio General Assembly with the appropriate county boards of elections prior to the February 17, 1994, filing

deadline, and have been certified to the May 3, 1994, primary election ballot.

Further Affiant says not.

/s/ John F. Bender
JOHN F. BENDER

Sworn to and subscribed in my presence this 18th day of April, 1994.

/s/ Jean Maxwell
JEAN MAXWELL
Notary Public

[NOTARY SEAL]